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No. 84-458

# In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES A. HENDRIX, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner contends that the district court abused its discretion in denying his motions for a severance and for a mistrial and that the court violated the Jencks Act.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of conspiracy to distribute and to possess with intent to distribute marijuana, in violation of 21 U.S.C. 846, and of conspiracy to import marijuana, in violation of 21 U.S.C. 963.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 32-33).

[1]Petitioner was acquitted on two substantive counts. Co-defendants Michael Carrigan and Dennis Benefito were convicted on all counts; co-defendant Dale Werhan was convicted on the conspiracy counts and acquitted on the substantive counts. Bobby Stewart, who was also charged in the indictment, pleaded guilty to one count of conspiracy and testified for the government at trial.

The evidence at trial showed that petitioner was involved in a scheme to fly marijuana into Alabama from Belize and Jamaica. In early 1981, Sam Styron[2] met with Dale Werhan and Mike Carrigan to discuss bringing a load of marijuana from Belize to a landing field near Foley, Alabama, where Styron operated a crop-dusting business (Tr. 41-42, 49, 51). Following a second meeting, Styron contacted petitioner, the former district attorney of Baldwin County, Alabama, to obtain his assistance in locating a pilot for the venture (Tr. 53-54, 679). Petitioner arranged a meeting between Styron and one Roger Ely, who had been prosecuted by petitioner for drug smuggling in 1976 (Tr. 452-453, 504). As a result of that meeting, a pilot contacted Styron and agreed to fly Carrigan's plane to Belize and return with the marijuana for a fee of $25,000. Tr. 54-58.

In exchange for $20,000, petitioner subsequently agreed with Styron to arrange with Bobby Stewart, chief criminal investigator for the Baldwin County Sheriff's Office, to keep law enforcement personnel away from the landing site (Tr. 62-63).[3] After the load was delivered, Carrigan and Werhan gave Styron between $20,000 and $25,000, and Styron paid $20,000 to petitioner (Tr. 66-67, 101-102). In connection with the delivery of a second load of marijuana, petitioner again agreed to arrange for "protection" at the landing site for another $20,000 (Tr. 70). Following delivery of the second load, co-defendant Dennis Benefito paid Styron $20,000. Rather than use this money to pay petitioner, however, Styron used it to hire a lawyer after he was arrested (Tr. 79).

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[2]Styron was an unindicted co-conspirator who testified for the government.

[3]Petitioner had contacted Stewart to secure a pilot, but later informed him that Styron had a pilot and needed only someone to unload and sell the marijuana (Tr. 452-457, 504). Petitioner also arranged with Stewart to keep the authorities away from Styron (Tr. 458-459, 509).

Petitioner testified at trial that the only money he had ever received from Styron was $11,500 for representing Styron's brother in connection with a drug arrest (Tr. 688-691, 700). Petitioner denied ever having any discussions with Styron about a drug deal (Tr. 703). He did not inculpate any of his co-defendants. The court sustained petitioner's objection to a question on cross-examination concerning his representation of criminal defendants while he was also a so-called supernumerary district attorney for the State (Tr. 724-725). A motion for mistrial on the basis of this question was denied (Tr. 729). Petitioner's co-defendants did not take the stand. Petitioner and Werhan presented a number of character witnesses; Carrigan and Benefito did not present a defense.

Prior to trial, the court denied petitioner's motion for a severance pursuant to Fed. R. Crim. P. 14.[4] Petitioner did not renew this motion at trial. Before closing argument, the court denied petitioner's request for permission to comment on the fact that his co-defendants had not testified.

2. a. Petitioner contends first (Pet. 12-17) that the district court abused its discretion in denying his pretrial severance motion because he was prejudiced by his inability to comment on his co-defendants' silence. This case presents neither the abuse of discretion nor the "compelling prejudice" necessary to reverse a conviction under Rule 14. See, *e.g.*, *United States* v. *Graziano*, 710 F.2d 691, 694 (11th Cir. 1983). Petitioner's factbound claim to the contrary does not merit this Court's review.

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[4]Fed. R. Crim. P. 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Petitioner does not take issue with the proposition that comment on the silence of co-defendants is required only where it is necessary to avert "real prejudice" to the defendant. *United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir.), cert. denied, 389 U.S. 1015 (1967); see, *e.g.*, *United States* v. *Kopituk*, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983). And he correctly recognizes (Pet. 15) that such prejudice has been found only where the defenses offered by the defendant and his co-defendants are truly antagonistic and mutually exclusive. See, *e.g.*, *United States* v. *Johnson*, 713 F.2d 633, 652 (11th Cir. 1983); *United States* v. *Graziano*, 710 F.2d at 695; *United States* v. *Alpern*, 564 F.2d 755, 761 (7th Cir. 1977); *United States* v. *Nakaladski*, 481 F.2d 289, 302 (5th Cir.), cert. denied, 414 U.S. 1064 (1973). Petitioner plainly fails to meet this test. There was nothing inconsistent in his defense with that of his co-defendants, nor did he implicate any of them in the crimes. Moreover, had the trials in fact been severed as petitioner claims they should have been, he would have been equally unable to comment on the failure of the other defendants to testify. Accordingly, he can point to no prejudice from his inability to comment on his co-defendants' failure to testify, and the denial of his motion to sever was well within the district court's discretion.[5]

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[5]Petitioner's real complaint seems to be that the evidence against his co-defendants was stronger than the evidence implicating him (see Pet. 16-17). Even if this were so — and petitioner scarcely alludes to the evidence against him — it would not require severance. See, *e.g.*, *United States* v. *Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981). In any event, petitioner should be held to have waived his severance claim by failing to renew his motion at trial. See *United States* v. *Jordan*, 602 F.2d 171, 173 (8th Cir.), cert. denied, 444 U.S. 878 (1979); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979). But cf. *United States* v. *Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981) (defendant did not waive issue where he moved for severance at trial but not before).

b. Petitioner contends next (Pet. 18-24) that the district court erred in refusing to grant a mistrial following the government's question to him on cross-examination concerning his simultaneous employment by the State and by criminal defendants.[6] Even assuming that the question was objectionable under Fed. R. Evid. 608(b),[7] a matter by no means clear (see note 6, *supra*, and note 8, *infra*), petitioner has utterly failed to demonstrate that it was so prejudicial as to require a mistrial. A former Attorney General of Alabama, who testified on petitioner's behalf, stated that it was his opinion, as well as that of the present Attorney General, that there was nothing improper in a supernumerary district attorney representing private clients (Tr. 742-743). This testimony, coupled with the district court's prompt action in sustaining petitioner's objection to the question (Tr. 724-725) and its instruction to the jury that the statements of counsel do not constitute evidence (Tr. 826), adequately negated any possible prejudice.[8]

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[6]As a "supernumerary district attorney," petitioner was paid $35,000 per year to be available to prosecute defendants as needed at the request of the State Attorney General (Tr. 724-725). Under Alabama law, supernumerary district attorneys are subject to the duties of the regular district attorneys. Ala. Code § 12-17-216 (1977). State law prohibits "[a]ll district attorneys and all full-time assistant district attorneys" from engaging in the practice of law except in the discharge of their official duties. Ala. Code § 12-17-184 (1977).

[7]Fed. R. Evid. 608(b) provides:

> **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may * * * [,] in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness * * *.

[8]This is not a case where the prosecutor acted in bad faith by asking a question known to be objectionable. Alabama law (see note 6, *supra*) and, indeed, common sense, suggested that there might be an impropriety in petitioner's simultaneous acceptance of $35,000 per year from

c. Finally, petitioner argues (Pet. 24-29) that the district court violated the Jencks Act (18 U.S.C. 3500) by failing to hold a hearing as to the existence of producible witness statements. This claim is without merit. After petitioner's counsel established on cross-examination that witness Bobby Stewart spoke with agents of the Drug Enforcement Administration before the indictment was returned, the attorney for defendant Benefito requested a copy of any statement made at that time.[9] The prosecutor responded that no written statement existed (Tr. 497-499). In response to Benefito's counsel's request for a further explanation from the government, the court ruled (*ibid.*):

> There is no testimony that there is a statement, written statement within the meaning of the Rules, which the Government has to turn over to counsel. We will proceed to the time you commence your cross-examination. If you want to take him on voir dire and go into that, we will.

No one asked Stewart any further questions about this discussion with DEA agents; before the court's ruling he had already testified, consistent with the government's representation, that his remarks at that time were not transcribed (see note 9, *supra*). Under these circumstances, it is clear that no violation of the Jencks Act occurred and that

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the State to be available as a prosecutor and his representation of criminal defendants. Moreover, petitioner does not contest the factual basis for the prosecutor's question — he admitted the conduct (Tr. 724-725). For these reasons, the cases relied on by petitioner (Pet. 22-24), reversing convictions where questions were asked in bad faith or without adequate basis in fact, are inapposite.

[9]Petitioner possessed a copy of the statement Stewart made on January 21, 1983, after the indictment had been returned. Stewart testified on cross-examination that the first statement of his that was taken down was made after the return of the indictment (Tr. 493).

the court was not required to pursue the matter further.[10] See *United States* v. *Judon*, 567 F.2d 1289, 1292 (5th Cir. 1978); *United States* v. *Lamma*, 349 F.2d 338, 341-342 (2d Cir.), cert. denied, 382 U.S. 947 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

NOVEMBER 1984

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[10]The cases cited by petitioner (Pet. 28) concerning the need for a hearing are inapposite, as they all dealt with the situation where government interview memoranda existed, and hearings were required to determine whether they were producible under the Jencks Act. In any event, petitioner never moved under the Act for production of material relating to Stewart, and so is not entitled to raise the point on appeal. Finally, petitioner's argument (Pet. 28-29) with respect to an allegedly missing statement of witness Sam Styron must also fail because Styron's own testimony indicated that no statement was made at the meeting in question (Tr. 160), a conclusion that petitioner did not contest at trial.

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